2013 IL App (2d) 121274-U
No. 2-12-1274
Order filed November 22, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BOARD OF MANAGERS OF ROSEGLEN CONDOMINIUM ASSOCIATION, Plaintiff-Appellant, v. COLEMAN FLOOR COMPANY, HAN-CHAIK, INC., f/k/a Sce Unlimited, Inc., PRATE INSTALLATIONS, INC., and PANEL BRICK MFG., INC., d/b/a/ Thin Brick By Owensboro, Defendants-Appellees (Denke & Roche Builders, Inc., W.E. Olson Company, d/b/a Panel Brick Company, Roseglen Joint Venture, and The Kirk Corporation, Defendants).	)	Appeal from the Circuit Court of Lake County. No. 11-L-110 Honorable David M. Hall, Diane Winter, Judges, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: Because *res judicata* barred plaintiff's second action as to the defendant subcontractors, the trial court correctly granted their motion to dismiss counts V through XVI of the 2011 amended complaint. However, because defendants RJV and Kirk consented to the second action, an exception to *res judicata* applied, and the

trial court erred by dismissing counts I through IV as to those defendants. Therefore, we affirmed in part, reversed in part, and remanded the cause.

¶ 2 Plaintiff, Board of Managers of Roseglen Condominium Association, filed a five-count complaint against defendants, Roseglen Joint Venture (RJV), The Kirk Corporation (Kirk), Denke & Roche Builders, Inc. (Denke), Coleman Floor Company (Coleman), Han-Chaik, Inc. f/k/a SCE Unlimited, Inc. (Han-Chaik), W.E. Olson Company d/b/a/ Panel Brick Company (Olson), Prate Installations, Inc. (Prate), and Panel Brick Mfg., Inc. d/b/a Thin Brick by Owensboro (Panel Brick), alleging various defects in the construction of a condominium complex. Certain defendants moved to dismiss plaintiff's complaint, and the trial court dismissed one of the counts with prejudice for failure to state a claim. Plaintiff then voluntarily dismissed the remainder of the complaint.

¶ 3 Eight months later, plaintiff filed another complaint against defendants. Again, certain defendants moved to dismiss the complaint on the basis of *res judicata* and other grounds. The trial court agreed that the complaint was barred by *res judicata* and dismissed it. Plaintiff appeals, and we affirm in part, reverse in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff governs a 12-building, 62-unit residential condominium complex that was constructed in 1995. On April 15, 2009, plaintiff filed a five-count complaint (2009 complaint) alleging construction defects in the common elements of the condominium. The alleged defects pertained to a brick panel and the improper installation of flashing and windows. The 2009 complaint alleged that RJV, the developer/seller, had dissolved on September 10, 2008, and did not have sufficient assets to repair the deficiencies. It further alleged that after Kirk, the general contractor, repaired the cracking in the brick at various locations of the condominium, Kirk sent

plaintiff a letter stating that the cracking in the brick was a maintenance issue and thus plaintiff's responsibility.

¶ 6 Count I of the 2009 complaint alleged breach of contract against RJV and Kirk for failure to construct in compliance with the building code, plans, and specifications. Count II alleged breach of implied warranty of habitability against RJV and Kirk. Count III alleged breach of implied warranty of habitability against Kirk and six subcontractors (Denke, Coleman, Han-Chaik, Olson, Prate, and Panel Brick), pursuant to *Minton v. The Richards Group of Chicago*, 116 Ill. App. 3d 852 (1983).[1] Count IV alleged breach of implied warranty of good workmanship and materials against RJV and Kirk. Finally, count V alleged breach of implied warranty of good workmanship and materials against Kirk and the six subcontractors pursuant to *Minton*.

¶ 7 Neither RJV nor Kirk filed appearances in the 2009 case. On July 16, 2009, Kirk filed notice of its bankruptcy case and of the automatic stay. The notice indicated that Kirk had filed for bankruptcy relief on May 12, 2009.

¶ 8 At some point, subcontractor Prate filed a motion to dismiss the 2009 complaint under sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2008)). Subcontractors Coleman and Panel Brick joined in the motion. A hearing occurred on October 21, 2009, and the subcontractors argued as follows with respect to counts III and V. Count III, which alleged breach of implied warranty of habitability, and count V, which alleged breach of implied warranty of good workmanship, were alleged against all of the subcontractors under a *Minton* theory. However, *Minton* applied only to the implied warranty of habitability and not to the

[1]In *Minton*, 116 Ill. App. 3d at 855, the court held that the implied warranty of habitability could extend to subcontractors where the builder/vendor was insolvent.

implied warranty of good workmanship; therefore, the subcontractors argued that plaintiff failed to state a cause of action against them in count V. The court agreed with the subcontractors that *Minton* had not been extended to the implied warranty of good workmanship, and it dismissed count V of plaintiff's 2009 complaint with prejudice for failure to state a claim. The court denied the motion to dismiss count III because it raised questions of fact.

¶ 9 Following the court's ruling, plaintiff's counsel advised the court that additional facts had come to light since the filing of the 2009 complaint, such as Kirk's filing for bankruptcy. Plaintiff requested 14 days to amend the complaint, and the court granted this request. Plaintiff did not file an amended complaint within 14 days, but the parties do not dispute that plaintiff filed an amended complaint nearly one month later, on November 17, 2009. Nearly seven months later, on June 9, 2010, plaintiff voluntarily dismissed the amended complaint in its entirety. The order stated that the matter was "voluntarily dismissed without prejudice."

¶ 10 On February 8, 2011, plaintiff refiled its action (2011 complaint). The 2011 complaint, which alleged the same construction defects as alleged in the 2009 complaint, named the six subcontractors but not RJV or Kirk. Count I alleged breach of implied warranty of habitability, and count II alleged breach of implied warranty of good workmanship.

¶ 11 On May 4, 2011, plaintiff filed an amended complaint (2011 amended complaint). The 2011 amended complaint added RJV and Kirk as defendants and alleged that Kirk knew as of 1998 that the cracking in the bricks was caused by construction defects. The 2011 amended complaint also stated that in April 2011, RJV and Kirk had agreed to assign to plaintiff all of their claims against the subcontractors responsible for the construction defects. On May 3, 2011, the bankruptcy court

entered an order approving the assignment of the claims. In addition, RJV and Kirk agreed to be named as defendants in the 2011 case.

¶ 12 The 2011 amended complaint alleged the same defects as in the other complaints but contained sixteen counts. Count I alleged breach of implied warranty of habitability against Kirk and the six subcontractors; count II alleged breach of contract against RJV and Kirk for failure to construct in compliance with the building code, plans, and specifications and with good workmanship and materials; count III alleged breach of implied warranty of habitability against RJV and Kirk; count IV alleged a claim for breach of contract against Kirk that RJV assigned to plaintiff for failure to construct in compliance with the building code, plans, and specifications and with good workmanship and materials; and counts V through XVI alleged claims assigned to plaintiff by RJV and Kirk for breach of contract against the six subcontractors for failure to construct in compliance with the building code, plans, and specifications, and with good workmanship and materials.

¶ 13 On July 28, 2011, four of the six subcontractors, Coleman, Han-Chaik, Prate, and Panel Brick (defendants)[2] filed a joint motion to dismiss the 2011 amended complaint under sections 2-615, 2-619, and 2-619.1 (735 ILCS 2-615, 619, 619.1 (West 2010)) of the Code. The motion to dismiss contained several grounds, including *res judicata*. See 735 ILCS 2-619(a)(4) (West 2010). Specifically, defendants argued that: (1) the 2011 amended complaint was premised on the same two theories, breach of implied warranty of habitability and breach of implied warranty of good

[2]Plaintiff does not dispute that subcontractor Olson was dismissed as a party by court order on June 21, 2011. Subcontractor Denke did not join in the motion to dismiss and has not filed a brief on appeal.

workmanship, alleged in the 2009 complaint; (2) count V, which alleged breach of the implied warranty of good workmanship, was dismissed with prejudice from plaintiff's 2009 complaint on October 21, 2009; (3) plaintiff could have proceeded to a decision against defendants in the 2009 complaint on its breach of implied warranty of habitability count, but did not do so; and (4) plaintiff, by voluntarily dismissing the 2009 complaint, subjected itself to a *res judicata* defense.

¶ 14 A hearing was held on May 22, 2012. At the hearing, plaintiff argued against granting the motion to dismiss by claiming that the first requirement of *res judicata* was not satisfied as to any of the assigned claims because there was never a final judgment against RJV or Kirk in the 2009 complaint. Also, with respect to Kirk specifically, plaintiff argued that within eight days of filing its 2009 complaint, Kirk filed for bankruptcy, thereby divesting the court of jurisdiction to make any ruling with respect to the claims against Kirk. Finally, plaintiff argued that both RJV and Kirk agreed to be named as defendants in the 2011 amended complaint, which was an exception to the application of *res judicata*. Plaintiff also argued that it would be inequitable to apply *res judicata* because the count that was dismissed in the 2009 case, count V, alleging breach of implied warranty of good workmanship, was identical, duplicative, and essentially subsumed in the remaining count, count III, alleging breach of implied warranty of habitability.

¶ 15 The court rejected plaintiff's arguments and granted defendants' motion to dismiss the 2011 amended complaint on the basis of *res judicata*. According to the court, the three requirements of *res judicata* were satisfied. First, there was a final judgment on the merits based on its dismissal with prejudice of count V of the 2009 complaint. Second, there was an identity of the causes of action in the 2009 and 2011 complaints in that the same set of facts was "necessary for the maintenance and proof in both cases." Third, there was an identity of parties or their privies. In

addition, the court found that it had jurisdiction over all of the parties with respect to the 2009 complaint. According to the court, the rule against claim splitting had been violated, and none of the exceptions to *res judicata* were applicable. Therefore, the court granted defendants' motion to dismiss on the basis of *res judicata* alone.

¶ 16 Plaintiff moved to reconsider the court's ruling, and the trial court denied this motion. Plaintiff timely appealed.

¶ 17 II. ANALYSIS

¶ 18 A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that defeats the plaintiff's claim. *Severino v. Freedom Woods, Inc.*, 407 Ill. App. 3d 238, 243 (2010). Section 2-619(a)(4) permits a defendant to file a motion for dismissal on the basis that the cause of action is barred by a prior judgment (*res judicata*). See 735 ILCS 5/2-619(a)(4) (West 2010). The standard of review from a dismissal under this section of the Code based upon the doctrine of *res judicata* is *de novo*. *Kiefer v. Rust-Oleum Corp.*, 394 Ill. App. 3d 485, 489 (2009).

¶ 19 The issue in this case is whether the involuntary dismissal of count V of plaintiff's 2009 complaint, combined with the subsequent voluntary dismissal of the remainder of that complaint, bar the 2011 case under the doctrine of *res judicata*. *Res judicata* is an equitable doctrine designed to prevent a multiplicity of lawsuits between the same parties in which the facts and issues are the same. *Severino*, 407 Ill. App. 3d at 244. "*Res judicata* bars a subsequent action if (1) a final judgment on the merits was rendered by a court of competent jurisdiction, (2) there is an identity of parties or their privies, and (3) there is an identity of cause of action." *Matejczyk v. City of Chicago*, 397 Ill. App. 3d 1, 3 (2009). The doctrine of *res judicata* bars not only what was actually decided

in the first action but also whatever could have been decided. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). "The burden of showing that *res judicata* applies is on the party invoking the doctrine." *Hernandez v. Pritikin*, 2012 IL 113054, ¶ 41. Plaintiff argues that none of the requirements of *res judicata* are satisfied in this case.

¶ 20 A. *Res Judicata* as to the Assigned Claims (Counts V-XVI)

¶ 21 1. Final Judgment on the Merits

¶ 22 Beginning with the first requirement, which is that a final judgment on the merits was rendered by a court of competent jurisdiction, we consider whether the court's dismissal with prejudice of count V in the 2009 case constituted such a "final judgment on the merits." In analyzing this issue, we review three supreme court cases on point.

¶ 23 First, in *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 335 (1996), our supreme court considered whether the trial court's granting of the defendants' motion to dismiss certain counts of a complaint constituted a final judgment on the merits for purposes of *res judicata*. In *Rein*, the plaintiffs filed an eight-count complaint (*Rein I*) alleging that the defendants fraudulently misrepresented the character of certain securities that they had sold to plaintiffs. *Id*. at 327. The plaintiffs sought recovery under various theories of law, including statutory rescission and common law fraud. *Id*. at 328. The defendants moved to dismiss the rescission counts, which the trial court granted based on the statute of limitations. *Id*. at 329. The plaintiffs then voluntarily dismissed the remaining counts of their complaint, and 19 months later, filed a virtually identical complaint (*Rein II*). *Id*. at 330-31. The defendants moved to dismiss *Rein II* based on *res judicata*. The trial court granted the motion, and both the appellate and supreme courts affirmed. *Id*. at 331, 333-34.

¶ 24 With respect to the first requirement for *res judicata*, the supreme court determined that the trial court's decision to grant the defendants' motion to dismiss the rescission counts in *Rein I* based on the applicable statute of limitations was a final adjudication on the merits and thus operated as a final judgment on the merits for purposes of *res judicata*. *Id*. at 336. The supreme court relied on Illinois Supreme Court Rule 273 (eff. Jan. 1, 1967), which provides that "[u]nless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." In discussing the rule against claim-splitting, the court reasoned that the plaintiffs could have proceeded to a decision on the merits of the common law counts in *Rein I*. *Id*. at 339. Having failed to do so, the plaintiffs were barred by the doctrine of *res judicata* from attempting to raise and litigate them in *Rein II*, despite no adjudication on the merits of the common law claims in the prior suit. *Id*.

¶ 25 Second, the supreme court issued *Hudson*. In *Hudson*, the plaintiffs filed a two-count wrongful death complaint (*Hudson I*) that alleged negligence in count I and willful and wanton misconduct in count II. *Id*. at 465-66. The defendants moved to dismiss the negligence count based on a claim of statutory immunity, and the trial court dismissed the negligence claim with prejudice. *Id*. at 466. The plaintiffs then voluntarily dismissed the willful and wanton misconduct count. *Id*. Nearly one year later, the plaintiffs refiled their wrongful death action, alleging only one count of willful and wanton misconduct (*Hudson II*). *Id*. The defendants moved to dismiss *Hudson II*, arguing that the dismissal of the plaintiffs' negligence claims in *Hudson I* constituted an adjudication on the merits, and that *res judicata* barred not only matters that were determined in the first action

but also matters that could have been determined in the first action. *Id*. Again, the appellate and supreme courts affirmed. *Id*. at 483-84.

¶ 26 Regarding the first requirement of *res judicata*, the *Hudson* court noted that *Rein* stands for the proposition that a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense. *Id*. at 473. The *Hudson* court held that the dismissal of the negligence count with prejudice in *Hudson I* operated as an adjudication on the merits for purposes of *res judicata*, even though there was not an adjudication on the merits of the willful and wanton misconduct count in *Hudson I*. *Id*. at 473-74.

¶ 27 Finally, the supreme court addressed the first requirement of *res judicata* in *Wilson v. Edward Hospital*, 2012 IL 112898, which was decided after the trial court dismissed plaintiff's 2011 case. In *Wilson*, the plaintiffs brought an action for medical malpractice, alleging that the doctors were negligent and agents of the hospital. *Wilson*, 2012 IL 112898, ¶¶ 1, 4. The defendant hospital moved for partial summary judgment on the basis that the doctors were neither its actual nor apparent agents. *Id*. ¶ 4. The trial court granted partial summary judgment on the ground that the doctors were not actual agents of the hospital, but it found a question of fact on the issue of whether the doctors were apparent agents of the hospital. *Id*. As in *Rein* and *Hudson*, the plaintiffs in *Wilson* voluntarily dismissed their complaint and refiled their action one year later. *Id*. The defendant hospital moved to dismiss on the basis of *res judicata*. *Id*. The trial court denied the motion to dismiss but granted the defendant hospital's motion for an order certifying the question of whether actual agency and apparent agency were separate "claims" for purposes of *res judicata*. *Id*. ¶¶ 4-5. Relying on *Rein* and *Hudson*, the appellate court answered the certified question in the affirmative,

determining that actual agency and apparent agency were separate claims subject to the bar of *res judicata* and the prohibition of claim-splitting. *Id.* ¶ 6.

¶ 28 In considering the first requirement of *res judicata*, the supreme court analyzed whether the trial court's summary judgment order finding that the defendant doctors were not the actual agents of the hospital was a final judgment on the merits. *Id.* ¶ 19. The court noted that an order is final if it either terminates the litigation between the parties on the merits or disposes of the rights of the parties on the entire controversy or a separate branch thereof. *Id.* Because the summary judgment order in *Wilson* did not end the litigation, the question was whether it disposed of the parties' rights on a separate branch of the controversy. *Id.* To answer this question, the court stated that an order disposes of a separate branch of a controversy when the bases for recovery of the counts which are dismissed are different from those which are left standing. *Id.* ¶ 21. "This may occur when the grounds for recovery under the various counts arise from different statutes or common law doctrines or when different elements are required to recover under different theories." *Id.* (quoting *Rice v. Burnley*, 230 Ill. App. 3d 987, 991 (1992)). As part of its analysis, the *Wilson* court distinguished between the terms "claim," "cause of action," and "theory of recovery." *Id.* ¶ 25. While "claim" and "cause of action" were synonymous, a "theory of recovery" was not a cause of action. *Id.* Rather, a single cause of action may give rise to several theories of recovery. *Id.*

¶ 29 Applying that logic, the supreme court in *Wilson* reasoned that the plaintiffs had but one claim or cause of action against the defendant hospital, which was negligence based upon the hospital's responsibility for the allegedly negligent acts of the defendant doctors. *Id.* ¶ 26. In other words, apparent agency and actual agency were not separate claims, and the plaintiffs had only a single claim for negligence based upon vicarious liability that was supported in different ways by

allegations of actual agency and apparent agency. *Id*. ¶¶ 6, 26. Because the trial court's grant of partial summary judgment on actual agency *merely removed some* of the allegations against the defendant hospital, the plaintiffs could still possibly prove the defendant hospital liable for negligence based upon their remaining allegations of apparent agency. *Id*. ¶ 26. For this reason, the summary judgment order did not dispose of the rights of the parties on a separate branch of the controversy, and the order was not final for *res judicata* purposes. *Id*.

¶ 30 Relying on *Wilson*, plaintiff argues that the trial court's dismissal of count V (implied warranty of good workmanship) did not dispose of its rights on a separate branch of the controversy. The question is whether the implied warranties of habitability and good workmanship are distinct theories of recovery for purposes of *res judicata*.

¶ 31 Beginning with the implied warranty of habitability, it is a "creature of public policy" that was designed to protect new home purchasers after latent defects in their homes were discovered. *1324 W. Pratt Condominium Ass'n v. Platt Construction Group, Inc.*, 2012 IL App (1st) 111474, ¶ 23. Prior to 1957, when the implied warranty of habitability was first applied, the rule of *caveat emptor* governed the sale of real property, and buyers could rely only on contract law in order to hold builders liable for construction defects in new homes. *Id*. Three public policy reasons have been identified to justify the implied warranty of habitability: (1) new home purchasers generally do not have the ability to determine whether the houses they have purchased contain latent defects; (2) the purchaser needs this protection because a new home is typically the largest single investment of his or her life, and the purchaser is usually relying on the honesty and competence of the builder, who, unlike the typical purchaser, is in the business of building homes; and (3) if construction of a new house is defective, its repair costs should be borne by the responsible builder/vendor who created

the latent defect. *Id.* ¶ 24. Since its initial acceptance, the implied warranty of habitability has been steadily expanded over the years. *Id.* ¶ 25. For example, the warranty now applies to successive purchasers of a new home, to subcontractors where a builder/vendor is insolvent, and to common elements of condominiums. *Id.*

¶ 32 Turning to the implied warranty of good workmanship, defendants are correct that although it predates the warranty of habitability, there is scant authority on the subject. Under the implied warranty of habitability, "[o]ne who contracts to perform construction work impliedly warrants to do the work in a reasonably workmanlike manner." *Zielinski v. Miller*, 277 Ill. App. 3d 35, 740 (1995); see also *Harmon v. Dawson*, 175 Ill. App. 3d 846, 850 (1988) (the law implies in all contracts, in the absence of an express agreement to the contrary, that materials agreed to be furnished shall be suitable for the purpose, and that labor shall be performed with reasonable skill); *Springdale Cemetery Ass'n v. Job Smith*, 32 Ill. 252 (1863) (same). Failure to do so is a breach of contract. *Zielinski*, 277 Ill. App. 3d at 740.

¶ 33 In support of its argument that the dismissal of the implied warranty of good workmanship count did not dispose of the parties' rights on a separate branch of the controversy, plaintiff points out the similarities of the two warranties. Plaintiff argues that both warranties amount to a promise not to engage in substandard work or to use substandard materials that would give rise to latent defects during construction, and both warranties give rise to the same measure of damages, *i.e.*, the cost of repair. With respect to the 2009 complaint, plaintiff points out that both counts alleged the same construction defects, making the implied warranty of good workmanship count redundant and duplicative of the implied warranty of habitability count. In other words, plaintiff argues that the implied warranty of good workmanship count was essentially "subsumed" in the breach of implied

warranty of habitability count. Whether denominated as a breach of implied warranty of habitability or a breach of implied warranty of good workmanship, plaintiff argues that the recovery remained the same.

¶ 34 Defendants take the opposite position of plaintiffs, arguing that the implied warranties of habitability and good workmanship are distinct grounds of recovery with different elements. The differences between the two warranties are significant, according to defendants, because unlike the implied warranty of good workmanship, the implied warranty of habitability applies strictly to buildings used for residential purposes. Another difference is that the implied warranty of habitability does not require privity of contract, meaning that it extends to subcontractors when the builder/vendor is insolvent, and to subsequent purchasers. As a result, defendants argue that the two warranties protect different categories of purchasers.

¶ 35 To illustrate that the two warranties represent distinct theories of recovery, defendants cite *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill. 2d 419 (1999). In *Board of Directors of Bloomfield Club Recreation Ass'n*, the plaintiff association filed a complaint against the defendants (developer/builder/seller), alleging that the defendants breached an implied warranty of habitability with respect to a certain commonly held facility, the clubhouse, within their residential development. *Id*. at 421. The issue was whether the doctrine of implied warranty of habitability should be further expanded by applying it to the circumstance where a commonly held amenity in a residential development contained defects that did *not* affect the habitability of the nearby residential dwellings. *Id*. at 426. The supreme court declined to do so, noting that there was no sound basis for expanding the applicability of that warranty to nonresidential units. *Id*. at 427. In reaching this result, the court distinguished cases in which the implied warranty

of habitability applied to latent defects in common areas of condominium or town house property, noting that the defects in those cases actually interfered with the habitability of the owners' residences. *Id*. at 429.

¶ 36 The critical language seized upon by defendants in *Board of Directors of Bloomfield Club Recreation Ass'n* is the Court's statement that its conclusion was by no means intended to absolve the defendants of their responsibility to construct nonresidential buildings free of latent defects. *Id*. at 430. The Court stated that on the contrary, the plaintiff association "could have made allegations under *different causes of action*" (emphasis added), and it cited a string of cases alleging breach of the implied warranty of good workmanship. *Id*. at 430-31. Because the element requiring interference with the habitability of a residence was the distinguishing trait of the implied warranty of habitability, and because that element was missing from the plaintiff association's allegations, the court noted that the implied warranty of habitability did not apply to that case. Defendants argue that the supreme court thus recognized the implied warranty of good workmanship as a distinct theory of recovery from the implied warranty of habitability in *Board of Directors of Bloomfield Club Recreation Ass'n*.

¶ 37 We agree with defendants that the counts alleging breach of implied warranty of habitability and breach of implied warranty of good workmanship were distinct, stand-alone legal theories of recovery. Plaintiff could recover under either theory independently. As a result, this case is distinguishable from *Wilson*, which did not remove a stand-alone theory of recovery but merely removed allegations within a single cause of action. In *Wilson*, actual and apparent agency were partial issues of one negligence claim; the removal of these allegations did not resolve the much larger questions of whether there was a duty, breach of duty, proximate cause, and damages. *Wilson*,

2012 IL 112898, ¶¶ 24, 26. In other words, actual agency and apparent agency were not in and of themselves distinct theories of recovery but rather allegations within a single cause of action. Rather than *Wilson*, this case is controlled by *Hudson* and *Rein*, which both involved the involuntary dismissal of stand-alone theories. See *Hudson*, 228 Ill. 2d at 473-74 (the involuntary dismissal of the negligence count was a final judgment on the merits for purposes of *res judicata* despite no adjudication on the willful and wanton misconduct count); *Rein*, 172 Ill. 2d at 336, 339 (the involuntary dismissal of the rescission counts was a final judgment on the merits for purposes of *res judicata* despite no adjudication on the merits of the common law fraud claims). Because the dismissal of the implied warranty of good workmanship count removed a stand-alone theory of recovery, it disposed of a separate branch of the controversy. Thus, there was a final judgment on the merits, thus satisfying the first requirement of *res judicata*.

¶ 38 2. Identity of Parties

¶ 39 The second *res judicata* requirement requires an identity of, or privity between, the parties in the suits. *Doe v. Gleicher*, 393 Ill. App. 3d 31, 39 (2009). Plaintiff argues that there is no identity of parties, at least as far as the assigned claims are concerned, because it brought the assigned claims in a different legal capacity. Whereas plaintiff sued in an individual capacity in the 2009 case, it points out that it brought the assigned claims in the 2011 case as RJV's and Kirk's assignee. Plaintiff also argues that it was directly adverse to RJV and Kirk in the 2009 case and therefore did not represent their interests in the initial case, which is necessary to establish privity. Finally, plaintiff argues that at the time the claims were assigned by RJV and Kirk, they were not barred by *res judicata* and thus cannot be barred on that basis now. Plaintiff relies on an Illinois case and a

federal case for its argument: *Evans v. General Motors Corp.*, 314 Ill. App. 3d 609 (2000), and *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950 (2000).

¶ 40 In *Evans*, the court considered whether the parties were in privity. There, the plaintiff Patricia brought her car to Howard Pontiac for brake repairs. *Evans*, 314 Ill. App. 3d at 611. Later, when Patricia was driving with her minor daughter Kelly, the brakes allegedly failed, causing an accident in which Kelly was injured. *Id*. Patricia filed suit against Howard Pontiac and General Motors Corporation (GMC), alleging several theories of recovery, including that the car had defective brakes, which Howard Pontiac did not properly replace or repair. *Id*. at 612. The parties settled. *Id*. Afterwards, Kelly, by and through her mother and next friend Patricia, filed suit against the same defendants to recover for Kelly's injuries in the accident. *Id*. Eventually, GMC moved for summary judgment as to the negligent brake repair allegation on the basis of *res judicata*, which the trial court granted. *Id*. at 613.

¶ 41 The appellate court reversed, determining that there was no identity of parties based on privity. *Id*. at 618. The court first noted that the right to recover for a minor child's injuries remained exclusively with Kelly and could not be brought by a parent acting in their individual capacity. *Id*. Moreover, because Patricia had filed her initial complaint solely in an individual capacity, Kelly's interests could not be adequately represented in that first action. *Id*. Thus, there was no privity between Kelly and Patricia and *res judicata* did not bar Kelly's suit. *Id*. at 618-19.

¶ 42 *Perry* involved the assignment of a right to sue. There, the plaintiff Perry challenged city ordinances regarding the seizure of abandoned vehicles. *Perry*, 227 F.3d at 951. In the course of challenging the ordinances, Perry claimed to have discovered evidence of municipal corruption and sued a Village employee and Globe Auto Recycling under civil Racketeer Influenced and Corrupt

Organizations Act (RICO) provisions. *Id*. After Perry's suit was dismissed with prejudice, Perry purchased the claims of another village resident, Lahucik, for whatever claims arose out of the seizure and towing of Lahucik's car. *Id*. at 952. In the capacity of Lahucik's assignee, Perry filed another suit raising the RICO theory that had failed in his own suit. *Id*. The district court dismissed the suit based on *res judicata*. *Id*. The reviewing court reversed, noting that Lahucik would have been entitled to bring *his own* suit, and that the assignee stands in the shoes of the assignor and assumes the same rights, title, and interest possessed by the assignor. *Id*. at 953. Because Lahucik's right to sue was conveyed to Perry in the assignment, there was no identity of parties. *Id*. at 953.

¶ 43 Defendants dispute plaintiff's position that there is no identity of parties here. Defendants point out that, on the contrary, plaintiff was the identical party in the 2009 and 2011 cases, as were defendants, which included RJV, Kirk, and the six subcontractors. Moreover, defendants argue that the fact that the assignors in this case (RJV and Kirk) were parties in the 2009 case is what distinguishes the instant case from *Evans* and *Perry*. For this reason, defendants argue that *Evans* and *Perry* actually support their position rather than plaintiff's position. We agree.

¶ 44 In *Evans* and *Perry*, neither Kelly nor Lahucik were parties in the first action. However, that is not the situation here, in which the assigned claims stem from a party in the first action. As defendants argue, plaintiff's status as an assignee makes no difference for purposes of the identical party requirement when the assignors (RJV and Kirk) and assignee (plaintiff) were both parties in the first action. Moreover, by arguing that it was adverse to RJV and Kirk in the first action and thus did not represent their interests, plaintiff improperly focuses on privity and ignores the fact that both cases involved identical parties. See *Evans*, 314 Ill. App. 3d at 618 ("Privity exists between parties who adequately represent the same legal interests."). *Res judicata* requires an identity of parties *or*

their privies. *Matejczyk*, 397 Ill. App. 3d at 3. Given that there was an identity of parties in this case, we need not even discuss privity. Therefore, the second *res judicata* requirement is clearly satisfied in this case.

¶ 45 3. Identity of Cause of Action

¶ 46 The third requirement of *res judicata* is an identity of cause of action. In order to determine whether there is an identity of causes of action, Illinois courts have traditionally relied on two separate tests, known as the "same evidence test" and the "transactional test." *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 332 (2009). In *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 310-11 (1998), however, the supreme court adopted the more liberal transactional test and rejected the more stringent standards of the same evidence test. Under the transactional test, "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *Id*. at 311. The transactional test allows claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction. *Id*.

¶ 47 Plaintiff argues that no identity of cause of action exists for the assigned counts. In the 2011 case, all of the assigned claims were for implied contractual indemnity in the event that RJV or Kirk were found liable to plaintiff in counts I, II, or III. In its brief, plaintiff points out that Kirk filed for bankruptcy protection in May 2009 and therefore filed no appearance in the 2009 case. As a result, Kirk filed no claims for indemnification against defendants in the 2009 case. Likewise, plaintiff points out that RJV filed no appearance or claims for indemnification against defendants in the 2009 case. Thus, plaintiff argues that RJV's and Kirk's rights to indemnification from defendants "were not and could not have been litigated in the 2009 case." Plaintiff argues that because these claims

were not assigned to it until after the voluntary dismissal of the 2009 case, the assigned claims were not the same cause of action asserted in the 2009 case.

¶ 48 Defendants refute plaintiff's argument in two ways. First, defendants point out that the assigned counts arose out of the same group of facts or "transaction" that formed the basis for the 2009 case. Defendants point out that the core factual allegations of the 2009 and 2011 complaints were identical, which were defendants' allegedly faulty installation of the condominium's brick veneer, flashing, and water barrier systems. Therefore, the 2009 and 2011 cases arose from a single group of operative facts; namely, the alleged construction defects of the condominium, and the same evidence was needed to sustain both cases.

¶ 49 Second, defendants point out that nothing prevented RJV and Kirk from asserting claims for indemnification against them, *i.e.*, the assigned claims, in the 2009 case. Specifically, with respect to Kirk's bankruptcy, defendants point to Rule 6009 of the Federal Rules of Bankruptcy (Fed. R. Bankr. P. 6009), which provides that "[w]ith or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceedings by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal."

¶ 50 In its reply brief, plaintiff does not dispute defendants' arguments regarding the transactional test or the ability of RJV and Kirk to bring claims for indemnification against defendants in the 2009 case. Instead, plaintiff argues for the first time that regardless of whether RJV and Kirk could have litigated their claims against defendants in the 2009 case, any claims RJV and Kirk had were counterclaims that could have been raised at any time. However, this argument is forfeited because arguments may not be raised for the first time in reply briefs. See Illinois Supreme Court Rule

341(h)(7) (eff. July 1, 2008); *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 19; see also *Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 507 (1997) (points not argued in an appellant's brief are forfeited and shall not be raised in the reply brief). By raising the counterclaim argument in its reply brief, plaintiff effectively prevented defendants from having the opportunity to respond to it. As a result, we do not consider it.

¶ 51 In applying the transactional test, it is clear, as defendants argued, that the assigned claims in the 2011 case arose out of the same set of facts as the 2009 case. Therefore, there is an identity of cause of action, and the third requirement of *res judicata* is satisfied in this case.

¶ 52 Having determined that all three requirements of *res judicata* are satisfied, we now consider whether any exceptions to that doctrine apply.

¶ 53 4. Exceptions to *Res Judicata*

¶ 54 Regarding the assigned claims, plaintiff argues that one exception to *res judicata* applies in this case. There are six exceptions set forth in section 26(1) of the Restatement (Second) of Judgments (1982), which were adopted by the supreme court in *Rein*. *Rein*, 172 Ill. 2d at 341. The particular exception urged by plaintiff is that it was "clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason." See *Severino*, 407 Ill. App. 3d at 249 (listing the six exceptions to claim-splitting).

¶ 55 On this issue, we agree with defendants that plaintiff presents no "extraordinary reason" that would prevent the application of *res judicata* to the 2011 case. The bulk of plaintiff's argument merely rehashes its position regarding a final judgment on the merits in relation to the supreme court cases *Rein*, *Hudson*, and *Wilson*. We have already addressed plaintiff's arguments to that effect and do not do so again here. The remainder of plaintiff's argument is based on a case, *In re Marriage*

of Takata, 304 Ill. App. 3d 85, 98-99 (1999), which did not involve an exception to *res judicata* and which is easily distinguishable from the instant case. In *Takata*, *res judicata* did not apply because there was no identical cause of action and because the party lacked the ability to discover the necessary information. See *id.* (*res judicata* did not apply where the subject matter of the petitions for rule to show cause were not identical and where the wife could not prove the husband's income until she learned in court that he shared a bank account with his wife). Accordingly, the "extraordinary reason" exception does not apply to the assigned claims.

¶ 56 B. RJV and Kirk (Counts I - IV)

¶ 57 Finally, we turn to the remaining four counts of plaintiff's 2011 amended complaint that were directed at RJV and Kirk. Count I alleged breach of implied warranty of habitability against Kirk (and the subcontractors); count II alleged breach of contract against RJV and Kirk for failure to construct in compliance with the building code, plans, and specifications and with good workmanship and materials; count III alleged breach of implied warranty of habitability against RJV and Kirk; and count IV alleged a claim for breach of contract against Kirk that RJV assigned to plaintiff for failure to construct in compliance with the building code, plans, and specifications and with good workmanship and materials. While *res judicata* would apply to these counts as well, plaintiff argues that both RJV and Kirk consented to the filing of the 2011 case against them, which is an exception to the application of *res judicata*.

¶ 58 At the outset, we note that neither RJV nor Kirk have filed appellees' briefs in this case. Nevertheless, we will address the merits of this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (in the absence of an

appellee's brief, a reviewing court should address an appeal on the merits where the record is simple and the claimed errors are such that the court may easily decide the issues raised by the appellant).

¶ 59 In considering the merits of plaintiff's claim, we agree that the exception to *res judicata* applies to RJV and Kirk in counts I through IV. "Under this exception, the rule against claim-splitting will not apply if the parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein." *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 895-96 (2009) (citing Restatement (Second) of Judgments § 26(1) (1982)). As plaintiff points out, the April 19, 2011, assignment agreement stated that "the Parties agree that [RJV] and Kirk may be named as nominal defendants in the Lake County Action for the purpose of permitting [plaintiff] to recover to the extent of any insurance coverage under [RJV's] and Kirk's respective liability insurance policies and on the Trustee claims ***." Therefore, the parties have agreed that plaintiff could bring claims of construction defects against RJV and Kirk in the 2011 case. Accordingly, *res judicata* does not bar counts I through IV as to RJV and Kirk, and the trial court erred by dismissing those counts on that basis.

¶ 60 III. CONCLUSION

¶ 61 For the above reasons, *res judicata* barred plaintiff's 2011 case as to defendants, and the trial court correctly granted defendants' motion to dismiss counts V through XVI of the 2011 amended complaint. However, because RJV and Kirk consented to be named as defendants in the 2011 case, the exception to *res judicata* applied, and the trial court erred by dismissing counts I through IV as to RJV and Kirk. Therefore, we affirm the judgment of the Lake County circuit court dismissing counts V through XVI of plaintiff's 2011 amended complaint, reverse its dismissal of counts I through IV, and remand the cause for further proceedings.

¶ 62 Affirmed in part and reversed in part; cause remanded.